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No. 83-1561

In the Supreme Court of the United States

OCTOBER TERM, 1983

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF ADA E. VAN HORNE, DECEASED,
ROBERT L. FARMER AND RICHARD R. COLE, EXECUTORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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TABLE OF AUTHORITIES

Page

Cases:

Estate of Lester v. *Commissioner*, 57 T.C. 503 ..... 3, 4

Propstra v. *United States*, 680 F.2d 1248 2

Statute:

Internal Revenue Code of 1954 (26 U.S.C.):

§ 2053 3

§ 2053(a)(3) 3

Miscellaneous:

Rev. Rul. 60-247, 1960-2 C.B. 272 3

Rev. Rul. 66-307, 1966-2 C.B. 429 3

Rev. Rul. 71-67, 1971-1 C.B. 271 4

Rev. Rul. 80-80, 1980-1 C.B. 194 ..... 2, 3

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1. Respondent concedes (Br. in Opp. 8-9) that the circuits are in conflict as to the relevance of post-death events in determining the validity and amount of claims against the estate generally, at least where the post-death event is the creditor's settlement, compromise or nonpresentation of his claim, or some other "voluntary action" (*id.* at 8) on the creditor's part. Respondent likewise concedes (*id.* at 8-9) that the circuits are in conflict as to the deductibility of alimony claims in particular, at least where the post-death event is the surviving spouse's remarriage or waiver of the claim. Yet respondent contends (*id.* at 8-10) that this case does not present the conflict because it is "factually distinguishable" (*id.* at 7) from the other cases. The post-death event here, respondent emphasizes, is the surviving spouse's death, an event not generally regarded as constituting "voluntary action" on a creditor's part.

As noted in our petition (at 6 n.3), this is a distinction without a difference. Respondent makes no effort to explain why the volitional nature of a post-death event should have any logical effect on its relevance, as a matter of law, in determining the deductibility of a claim.[1] No court that has required consideration of post-death events in valuing claims against the estate has mentioned, much less relied on, the event's "voluntariness" as a basis of decision. Nor has any court that has held post-death events irrelevant for that purpose relied on the event's involuntary character. The Ninth Circuit below certainly did not do so, holding simply "that post-death events [must] be disregarded when valuing legally recognized and enforceable claims against an estate" (Pet. App. 4a-5a (footnote omitted)). Indeed, the Ninth Circuit (*ibid.*) believed its decision here controlled by its prior decision in *Propstra* v. *United States*, 680 F.2d 1248 (1982), a case in which the post-death event was the creditor's voluntary compromise of its claim.

In short, respondent has pointed to no legally significant distinction between this case and the cases cited in our petition (at 5-11). Nor has respondent challenged our contention that those other circuits would have decided this case differently from the Ninth Circuit. Resolution of the conflict by this Court is thus appropriate.

2. Respondent errs in contending (Br. in Opp. 6-7) that the Commissioner's position in this case is inconsistent with his position in Rev. Rul. 80-80, 1980-1 C.B. 194. That ruling considered the circumstances in which "the physical condition of an individual [will] justify departure from using the

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[1]The Tax Court below speculated that the voluntary nature of a post-death event might render an actuarial date-of-death computation difficult, thus necessitating consideration of the events that actually transpire (Pet. App. 23a-24a n.8). We demonstrated in our petition (at 6 n.3) the error of that speculation, and respondent does not appear to rely on it. See Br. in Opp. 10.

actuarial tables to value property interests" (*id.* at 194). The Commissioner concluded that such departure is proper only where the life tenant's death is "clearly imminent," clarifying a previous ruling that had conditioned departure on the life tenant's likely inability to survive "for more than a brief period of time." *Id.* at 195, clarifying Rev. Rul. 66-307, 1966-2 C.B. 429.

Revenue Ruling 80-80 has no application here. It assumed a situation in which resort to actuarial tables would otherwise be proper, and defined an exception to that rule based on the life tenant's health. It did not purport to list all of the situations in which actuarial tables must or may be used in the first instance (1980-1 C.B. at 195). In particular, it did not consider whether resort to actuarial tables would be required or allowed in computing the deduction for claims against the estate under Section 2053(a)(3). Indeed, the ruling does not mention Section 2053, and the introduction (1980-1 C.B. at 194) does not list Section 2053 as a section to which the conclusion stated in the ruling applies. The Commissioner's published position on the question presented here has been clear at least since 1960, when he ruled that "no deduction will be allowed for claims against the estate which have not been paid or will not be paid." Rev. Rul. 60-247, 1960-2 C.B. 272, 274. Nothing in Revenue Ruling 80-80 is inconsistent with that position.

3. Respondent likewise errs in contending (Br. in Opp. 4-6) that the Commissioner's position here is inconsistent with the position he took in *Estate of Lester* v. *Commissioner*, 57 T.C. 503 (1972). In that case, the husband was obligated under a divorce decree to pay his ex-wife $1,000 per month for 130 months or until her death, whichever event first occurred (*id.* at 504). When the husband died, his estate became liable for the remaining monthly payments, which numbered 111 at that time. On its federal estate tax

return, the estate claimed a deduction (on account of the ex-wife's alimony claim) of $111,000 — the undiscounted value of 111 monthly payments, without taking into account the survival contingency. The Commissioner proposed to allow a deduction of only $92,456 — the actuarial value of the ex-wife's alimony claim, reflecting both the survival contingency and the time value of money (*id.* at 504-505). The Tax Court (*id.* at 507) upheld the Commissioner's determination.

The Commissioner's position in *Estate of Lester* is not inconsistent with his position here. In *Estate of Lester*, the post-death event relevant to computation of the ex-wife's alimony claim — her death — had not occurred at the time the estate's tax liability was finally determined. In those circumstances, the Service, following its usual practice, required that the ex-wife's claim be valued actuarially.[2] In this case, by contrast, the relevant post-death event *has* occurred, and the question is whether the actuarial value of the claim should be deductible even though a lesser amount was actually payable and actually paid to discharge the claim in full.[3]

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[2]See, *e.g.*, Rev. Rul. 71-67, 1971-1 C.B. 271 (holding that an estate may deduct the actuarial value of a support claim where the terminating event — the surviving spouse's death or remarriage — has not occurred).

[3]As an alternative argument before the Tax Court, the taxpayer in *Estate of Lester* noted that it had actually discharged the ex-wife's claim by purchasing an annuity at an aggregate cost of $102,700, and contended that it should be allowed to deduct this sum rather than the actuarial amount ($92,456) determined by the Commissioner (57 T.C. at 506). The Tax Court rejected this contention without discussion (*id.* at 507), and did so correctly. When the taxpayer in *Estate of Lester* purchased the annuity, the divorce decree that had originally created the ex-wife's claim was amended to permit satisfaction of her claim by purchase of an annuity, and to add her son and grandson as secondary beneficiaries in the event of her premature death (*id.* at 505). Thus, not only did the estate's actual payments to the ex-wife exceed the amount theoretically due her, but the payments were made pursuant to a claim that was different from that which existed at the time of the husband's death.

4. Respondent notes correctly (Br. in Opp. 11-13) that, if the Commissioner's position on the question presented is ultimately sustained, certain ancillary questions of a practical nature — *e.g.*, the cut-off date for considering post-death events in valuing claims against the estate — will also have to be considered, either in this case or in other cases. Many of these questions, we think, can be answered by reference to the regulations' existing procedures respecting estimated deductions generally. See Pet. 10-11. In any event, respondent's observation has no bearing on the propriety of granting certiorari to resolve the conflict in the circuits. This Court can resolve that conflict by deciding, in principle, whether post-death events are relevant in determining the validity and amount of claims against the estate. If the Court were to sustain the Commissioner's position, ancillary questions not reached below could be considered on remand, by the courts in other cases, or by the Commissioner as an administrative matter.[4]

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MAY 1984

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[4]Respondents' assertions as to the alleged unfairness of the Commissioner's position (Br. in Opp. 11-12) raise questions more appropriate for consideration in a brief on the merits. In essence, they are contentions about how the conflict in the circuits should be resolved, rather than about whether it should be resolved.